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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Petitioners,

vs.

GARY D. SMIDDY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

IRA REINER,
City Attorney of Los Angeles
JOHN T. NEVILLE,
Senior Assistant City Attorney
RICHARD M. HELGESON,
Assistant City Attorney
1700 City Hall East
200 North Main Street
Los Angeles, CA 90012
(213) 485-3626

Attorneys for Petitioners.

The Brief Shop • Legal Printers • (213) 877-8620

QUESTIONS PRESENTED

1. Whether the simple negligence of law enforcement officials in the conduct of a criminal investigation which results in an unprivileged deprivation of the physical liberty of a plaintiff, violates any duty implicit in the Due Process Clause of the Fourteenth Amendment when the state provides expansive and comprehensive post deprivation redress for such negligence.
2. Whether juries in civil rights actions involving claims of false arrest are to evaluate probable cause under the abstract legal definition of that term designed to guide judges in their rulings upon the law, or in the manner required by the common law, the law of the arresting state and the overwhelming weight of American authority.
3. Whether this Court's decision in *Gasoline Products Co. v. Champlin Refining Co.* (1931) 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1118, requires a complete retrial as opposed to a limited remand for a damages redetermination when a judgment is reversed due to erroneous instructions on causation and damages.

PARTIES IN THE COURT BELOW

Dudley D. Varney, Sidney J. Nuckles and Raymond D. Inglin were Defendants-Appellants in the court below. Gary D. Smiddy was Plaintiff-Appellee in the court below. Although Gaston Herrera, Jesus G. Aguilar, the City of Los Angeles and the County of Los Angeles were also named as Defendants in the District Court they did not take part in the appeal of this matter in the Ninth Circuit Court of Appeals below.

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Del Carmen, Roland V., "An Overview of Civil and Criminal Liabilities of Police Officers and Departments," American Journal of Criminal Law, March 1981, Vol. 9, No. 1, p. 33 15

Kirby, "Demoting 14th Amendment Claims to State Torts — A New Rationale for Curtailing Federal Civil Rights Litigation," Journal of the American Bar Association, February 1982, Vol. 68, p. 167 5

Prosser, W., The Law of Torts (4th Ed. 1971):
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners, Dudley D. Varney, Sidney J. Nuckles and Raymond D. Inglin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this case on August 7, 1981 and amended on December 21, 1981.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit holding three Los Angeles City Police Officers liable under the Civil Rights Act (42 U.S.C. §1983) for failure to employ proper polygraph techniques and for their alleged negligence in not investigating more thoroughly, the circumstances surrounding a murder of which the Plaintiff was suspected, is reported at 665 F.2d 261 and is attached hereto as Appendix A.

JURISDICTION

Petitioners were Appellants in this case in the Ninth Circuit below. The original opinion and judgment was entered on August 7, 1981, and was modified upon denial of Respondent's Petition for Rehearing and Suggestion for Rehearing En Banc on December 21, 1981. Petitioners' Petition for Rehearing in the Ninth Circuit Court of Appeals was denied on February 25, 1981. This petition is timely filed within 90 days of that date (28 U.S.C. §2101(c)). The order denying rehearing is set forth in Appendix B. Mandate was stayed pending the outcome of this Petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Constitution of the United States
   Amendment 14, §1 — Appendix D-1
2. The Civil Rights Act of 1871
   (42 U.S.C. §1983) — Appendix D-1
3. California Government Code
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STATEMENT OF THE CASE

Respondent Gary Smiddy was Plaintiff in an action brought pursuant to 42 U.S.C. §1983 in the United States District Court for the Central District of California. Petitioners Varney and Nuckles were two experienced Los Angeles Police Department homicide investigators who invetigated the murder of Linda Miller, a twenty-two year old woman, last seen with Smiddy, in Los Angeles in 1973. Petitioner Inglin, a Los Angeles Police Officer, was the

Chief Polygraph Examiner for the Los Angeles Police Department. Smiddy brought this §1983 action against Petitioners after his arrest and prosecution for the murder of Linda Miller in 1973 and 1974.

The trial court record in this case is substantial, entailing 26 volumes with 4207 pages of reported oral proceedings. The evidence concerning the information available to the officers upon which the question of the reasonableness or unreasonableness of their conduct turned however was largely undisputed. 1/

The Court of Appeals was painstaking in developing the statement of this case in the attached opinion. Parts I and II of the opinion of the Court of Appeals provide an overview of the more important facts which were developed in the trial of the case and sufficiently sets forth the factual underpinnings of this matter to permit review of the questions presented here.

The gravamen of Smiddy's case was the negligent deprivation of his federal constitutional right to liberty. The opinion of the Court of Appeals accurately reflects that the evidence Smiddy produced in the twenty-three day trial of this case was designed to show (1) that it was unlikely that he killed Linda Miller (2) that Varney and Nuckles conducted their inquiry negligently (Appendix A-3) and (3) that Inglin improperly conducted the polygraph examination of the Plaintiff (Appendix A-5, A-8).

1/ This proposition was acceded by Respondent both in the trial court (CT 292:25 - 293:2) and in the Court of Appeals (Appellees Brief p. 46).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE ISSUE POSED BY THIS CASE — WHETHER THE DUE PROCESS CLAUSE IS VIOLATED BY STATE LAW REDRESSABLE SIMPLE NEGLIGENCE OF OFFICERS WHICH CAUSES A DEPRIVATION OF PHYSICAL LIBERTY — HAS NEVER BEEN DECIDED BY THIS COURT AND IS AN ISSUE OF ENORMOUS IMPORTANCE.

The District Court made it very clear during the proceedings below that the question of whether negligent conduct violating the civil rights of an inhabitant of that judicial district was actionable under §1983, was to answered in the affirmative (22 RT 3867). And its charge to the jury was founded upon this conception. At the time of the trial it was well established in the Ninth Circuit that negligent conduct alone could form the basis for liability under §1983. (*Navarette v. Enomoto* (9th Cir. 1976) 536 F.2d 277, *reversed on other grounds sub nom, Procunier v. Navarette* (1978) 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24).

Last term this Court handed down *Parrat v. Taylor* (1981) 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908, which answered the question previously vexing several circuits whether negligence could ever be a basis for liability under §1983.

In answering this question in the affirmative, depending on the particular constitutional violation, the Court held that in that case the Plaintiff's deprivation of his property

had not occurred without due process because of the availability of a state tort claim system for redress of this deprivation.

The implications of the Court's decision last term in *Parrat* have generated enormous interest by the organized bar of our nation. The February 1982 issue of the Journal of the American Bar Association made the following observation concerning *Parrat*:

> "The Supreme Court's rulings at the end of its last term on such controversial issues as an all-male draft registration, the secretary of state's authority to revoke passports on national security grounds, and the president's agreements with Iran completely over-shadowed the Court's holding in *Parratt v. Taylor*, 101 S.Ct. 1908, that a state prison warden's negligent loss of an inmate's $23.50 hobby kit does not necessarily provide grounds for a federal civil rights lawsuit. Yet, the rationale of Justice Rehnquist's majority opinion in that apparently trivial case marks a trail that followed to its logical conclusion, could lead to a sweeping curtailment of federal civil rights litigation in favor of state courts and remedies. It ultimately may restrict 14th Amendment due process or equal protection litigation to challenges to official policies or practices directly attributable to the state as an entity, leaving individual acts of official misconduct by state officers to be remedied under state law."
>
> Tom Kirby, ***Demoting 14th Amendment Claims To State Torts — A New Rationale for Curtailing Federal Civil Rights Litigation***, Journal of the American Bar Association, February 1982, Vol. 68, p. 167.

Parrat dealt only with the negligent deprivation of a prisoner's $23.50 hobby kit. The present case involving an isolated instance of simple negligence which caused the deprivation of plaintiff's physical liberty poses the vehicle for the court to fully explore the ramifications and logical implications of its holding in ***Parrat***. It may be that the duty of the state with respect to more egregious conduct than here, such as recklessness, gross negligence, deliberate misconduct or maliciousness implicates the due process clause differently in the context of a Fourteenth Amendment physical liberty deprivation. However this case poses the question whether the simple passive negligence of three police officers, two homicide investigators and a polygraph operator, resulting in an unprivileged deprivation of the physical liberty of a plaintiff can violate a Fourteenth Amendment duty, when the state provides substantial post deprivation relief. In ***Rutledge v. Arizona*** (9th Cir. 1981), the appellant had been a punter on the football team at Arizona State University. In his §1983 complaint filed in the United States District Court for the District of Arizona he alleged that his football coach after what he thought was a poor punt took appellant's helmeted head between his two hands, shook his head from side to side, yelled obscenities at him, and then struck him with a fist in the mouth (660 F.2d 1345, 1347). Judge Sneed writing for the majority held that the alleged assault and battery deprived the appellant of his "liberty" within the meaning of the Fourteenth Amendment, however the deprivation did not occur "without due process of law" since the state provided an adequate post deprivation hearing under Arizona law in the Arizona Courts (660 F.2d 1345, 1352).

The procedural due process question involved in an assessment of the state's conduct in the case at bar is very easily answered. The state of California provides a system

of hearings for persons who claim to have been falsely arrested or falsely imprisoned. The substantive due process question is more general and at the same time from the language in decisions of this Court seems more difficult and elusive to capture within a descriptive test.

In *Estelle v. Gamble* (1976) 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251, this Court determined that an Eighth Amendment violation in providing inmate medical care required at least "deliberate indifference" on the part of prison authorities. Mere negligence was thus found to be insufficient to establish a substantive due process — liberty — Eighth Amendment violation. Substantive due process violations have also been frequently described by reference to the expression employed by Justice Frankfurther in *Rochin v. California* (1952) 342 U.S. 165, 72 S.Ct. 196, 96 L.Ed. 183, as conduct which "shocks the conscience" — apparently a concept more extreme than the ordinary negligence test employed in this case.

The general conception of what may constitute a liberty deprivation involving a Fourth Amendment substantive due process violation where no invalid state law is involved, can be seen in *Monroe v. Pape* (1961) 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, the seminal damage case spawning the Court's contemporary development of §1983. There thirteen Chicago police officers broke down the doors of the plaintiffs home without warning at 5:45 a.m., forced him and his family to stand naked in the living room, ransacked his entire home, arrested him and took him to the police station, then released him ten hours later without bringing any charges or providing any further explanation. In holding that §1983 unlike its criminal counterpart required no showing of specific intent to violate Fourteenth Amendment rights the Court stated that section 1983

"should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." (365 U.S. 167, 187.) If tort law bases of liability are applied to *Monroe* the defendants probably committed the intentional torts of assault, battery, false imprisonment, false arrest, intentional infliction of emotional distress and invasion of privacy. One lower federal court characterized the minimum degree of culpability established by *Monroe* as requiring an "abuse of official position" (*Popow v. City of Margate* (N.J., 1979) 476 F.Supp. 1237, 1243-44).

It is far more accurate however to observe simply that the conduct of the police in *Monroe* manifestly "shocked the conscience" under the due process standard coined by Mr. Justice Frankfurther in *Rochin v. California* (1952) 342 U.S. 165, 172. In his dissent in *Monroe* Justice Frankfurter indicated:

> "If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick." (365 U.S. 167, 211.)

It is no coincidence that other post *Monroe* decisions authored by this Court which have intimated substantive due process violations in Fourth Amendment implicating conduct involving common law false arrest allegations have been accompanied by aggravated circumstances showing at minimum gross negligence or wilful misconduct on the part of the arresting officials.

For example in *Bivens v. Six Unknown Federal Narcotics Agents* (1971) 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619, defendants entered the plaintiff's apartment and arrested him. They manacled him in front of his wife and children and threatened to arrest the entire family.

They searched the apartment from stem to stern and thereafter took the plaintiff to the Brooklyn federal courthouse where he was interrogated, booked and subjected to a visual strip search (403 U.S. 388, 389). Although the present case also sounds in false arrest and false imprisonment, it does not revolve upon the type of egregious factual circumstances seen in ***Monroe*** or ***Bivens***. The thrust of Respondent's lawsuit in the District Court, as noted in the opinion of the Court of Appeals, was that it was not likely that he killed the murder victim and that the police investigation of this murder was conducted negligently.

In ***Paul v. Davis*** (1976) 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405, this Court held that no cause of action was stated when defendants state officials published allegedly defamatory material concerning the plaintiff. The Court cautioned against a construction of the Fourteenth Amendment in §1983 actions which would create a "font of tort law." It appears the Court employed a similar anlaysis in 1979 in ***Baker v. McCollum*** (1979) 61 L.Ed.2d 443, 99 S.Ct. 2689, where the Court held that false imprisonment by a state officer without more did not implicate the Fourteenth Amendment. The ***Baker*** case is a logical precursor to the issue posed by this case. In ***Baker*** the sheriff was alleged to have negligently misidentified the suspect whose arrest appeared to be called for by an arrest warrant valid on its face. The Court held that not every incarceration caused by the unreasonable failure to ascertain the identity of the perpetrator of a crime is actionable under §1983. In the present case there was no arrest warrant, however, the jury apparently determined that the police were negligent in concluding that Smiddy was the perpetrator of the crime, and found that there was therefore not reasonable cause for his arrest.

This case therefore requires resolution of the question whether such action can possibly constitute a deprivation of physical liberty without due process of law in light of the panorama of postdeprivation rights provided by the state. The first question this court must address is what is the duty of the state in the conduct of a criminal investigation such as this one involving the pursuit of the numerous leads and pieces of evidence which were developed by the defendants. Certainly negligence in the conduct of such an investigation which causes a deprivation of plaintiffs physical liberty may implicate the due process clause but we feel that the state does not commit this deprivation "without due process of law" when it provides a readily available form of redress for such a deprivation. The due process clause should not, and surely cannot, require more than when a state by its negligence causes such a deprivation that it provide a reasonable system of redress.

This conception of the Fourteenth Amendment due process clause should not seem novel or surprising and, in fact, is in accord with the practical realities of living in our modern complicated civilization. Professional negligence occurs with actuarial certainty in all occupations and callings. No matter how complete the rules or regulations these police officials might have operated within, or how comprehensive their training, or how consumate the development of their skills, there is no way the state could have eliminated in advance the possibility that they might be found to have acted negligently in the conduct of their investigative activities. It is precisely because we expect negligent conduct by both ourselves and others, to occur with predictable frequency, that we take steps to indemnify monetarily against loss which results from it. It is the reason we provide insurance in driving our automobiles, in living in our homes, and in carrying on our professional

endeavors. The Constitution cannot require that the state guarantee unconditionally that no negligently caused deprivation of one's physical liberty of the type addressed by this case may ever occur.

It is Petitioners' contention that a state legal structure such as California's which both in theory and in practical operation provides a system of remedies for persons who may be injured by the state's negligent action provides at least the minimum due process requirements necessary to satisfy the Fourteenth Amendment. A state official's neglience which results in an unprivileged deprivation of physical liberty should not therefore violate the due process clause unless the state provides no reasonable method for redress from the negligent conduct. This conclusion must logically flow from any practical application of the due process clause to this case because their is not and never has been any final way to prevent negligence in advance of its occurrance. Thus, a predeprivation remedy for such conduct is not just impractical, it is impossible. When a tort concept such as negligence is involved in the deprivation of physical liberty all that can therefore reasonably be required of the state as a practical matter is that it provide a reasonable post deprivation system for redress.

An injury caused through negligent conduct by police officers in California, in general, is redressable through the California Government Tort Claims Act (Government Code §815 et seq.). Redress in actions for false arrest or false imprisonment is specifically provided by California Government Code §820.4. In addition to the state tort liability scheme statutorily set forth in California Government Code §815 et seq., the state also provides a comprehensive §1983 based remedy in state court (***Williams v. Horvath*** (1976) 16 Cal.3d 834). This Court in 1980 apparently approved California's provision of this scheme for

exercise of state court jurisdiction over claims substantively cognizable under §1983 (*Martinez v. California* (1980) 444 U.S. 277, 62 L.Ed.2d 481, 100 S. Ct. 553). It seems incongruous in light of this that Respondent should assert that California denied him due process, while at the same time the state clearly provides for a cause of action in state court which completely embraces the entire breadth of Section 1983. Nor can the respondent contend that the California general tort remedy is inadequate simply because it contains certain immunities one of which might arguably shield the officers in this case from damages for malicious prosecution (California Government Code §821.6; *Jackson v. City of San Diego* (1981) 121 Cal.App.3d 578). A state system of government tort law which immunizes certain species of official conduct does not by reason of that fact alone violate due process. However, even if the California Government Tort Claims Act were somehow constitutionally deficient, California law nevertheless provides for state court jurisdiction over constitutionally based claims to the extent the state does not, through its State Tort Claims Act, redress a particular violation of a federally recognized right (*Martinez v. California, supra*.)

In addition to its civil system for redress, California provides an elaborate system of procedural safeguards for defendants in criminal cases. Smiddy availed himself of these safeguards first in a preliminary examination in the Municipal Court before a magistrate (California Penal Code §§858-882) (1 RT 19-20; 5 RT 675; 7 RT 1014) and later in a procedure to set aside the information in the Superior Court (California Penal Code §§995-999) (1 RT 19-20; 5 RT 675; 18 RT 3096-97).

In California a defendant who is charged with a felony is entitled within ten days of arraignment to a preliminary

examination before a magistrate in the Municipal Court (Penal Code §859(b)). Here the witnesses against him must be examined in the defendant's presence and may be cross-examined on behalf of the defendant (California Penal Code §865). The defendant may also produce any other witnesses, who must be sworn and examined (California Penal Code §866). At the conclusion of the preliminary examination the complaint must be dismissed and the defendant discharged should the hearing not establish probable cause to believe the accused committed the charged crime (California Penal Code §871; ***People v. Uhleman*** (1973) 9 Cal.3d 662, 667). If the Municipal Court determines that there is probable cause and binds the defendant over to the Superior Court, the defendant has a right to challenge the probable cause determination a second time before a judge of the Superior Court (California Penal Code §995). Smiddy availed himself of this procedure and the Superior Court, differing with the Municipal Court, set the information aside and discharged Smiddy.

Petitioners feel that the Plaintiff received due process in this case, first through the dismissal of the criminal action against him by means of the state's criminal justice machinery and, secondly, through the availability of a comprehensive system of state governmental tort liability which embraced both his claims of false arrest and false imprisonment, and any claim he could otherwise have under 42 U.S.C. §1983. Smiddy availed himself of California's due process machinery when he challenged the sufficiency of the evidence in his criminal case under California Penal Code §995, and it was pursuant to these criminal procedural safeguards that Smiddy's criminal case was dismissed. In addition California provides a comprehensive state civil remedy for its police officers' alleged negligence, however Smiddy never bothered to pursue this remedy.

There are grave risks to a credible construction of the Fourteenth Amendment if state law redressible simple negligence resulting in a common law false arrest may be held under these circumstances to nevertheless violate the due process clause. There has been no challenge here to official policies or practices attributable to the state as an entity. The position plaintiff advanced was that the individual officers acted unreasonably, not that the state government tort claims or public liability systems were defective. California law requires that is inhabitants shall not be arrested without probable cause and provides substantial redress for any breach of this standard both in its criminal justice processes and in its tort claims and civil liability system. Under circumstances as here where police officers are guilty, at best, of simple negligence due process cannot be violated unless the states practices or policies deny a reasonable scheme for redress.

The 1871 Civil Rights Act was passed by Congress because certain states were unwilling to take action to redress wrongs committed on their citizens, however California has long provided a system for redress of wrongs committed under color of official authority. Plaintiff's conception of substantive due process would require in advance that state law enforcement officials may never err in the investigation of criminal suspects. The due process clause of the Fourteenth Amendment cannot require this impossible standard under the circumstances set forth here. We feel the unfortunate lot of the police officers in this case, who may have acted with an honest conviction although found to be unreasonable, is best summed up in a statement by a legal scholar in a recent article dealing with §1983:

> "The citizen expects law enforcement officers to have the wisdom of Solomon, the courage of David, the strength of Samson, the patience of Job, the leadership of Moses, the kindness of the Good Samaritan, the faith of Duniel, the tolerance of the Carpenter of Nazareth and, finally, an intimate knowledge of every branch of the Natural, Biological, and Social Sciences. If each person has all these qualities, he/she might be a good officer!"
>
> Roland V. Del Carmen, ***An Overview of Civil and Criminal Liabilities of Police Officers and Departments***, American Journal of Criminal Law, March 1981, Vol. 9, No. 1, p. 33.

The state has done all that it is possible for it to do in a case of this nature. The due process clause of the Fourteenth Amendment can require no more.

II.

THE COURT SHOULD DECIDE THE CORRECT MANNER TO INSTRUCT THE TRIER OF FACT WITH RESPECT TO THE ISSUE OF PROBABLE CAUSE SINCE THE EIGHTH AND NINTH CIRCUIT STANDARD BY WHICH THE JURY DECIDES PROBABLE CAUSE IS CONTRARY TO THAT USED IN SOME OTHER CIRCUITS AND AGAINST THE OVERWHELMING WEIGHT OF AMERICAN AUTHORITY. BECAUSE OF THE IMPORTANCE OF THE QUESTION OF PROBABLE CAUSE IN §1983 ACTIONS THE COURT SHOULD ADDRESS THE DIFFERENCE BETWEEN PROBABLE CAUSE AND THE GOOD FAITH IMMUNITY IN §1983 ACTIONS INVOLVING DEPRIVATIONS OF PHYSICAL LIBERTY.

In the instant case the facts regarding the basis for the defendant's arrest of the plaintiff were not in dispute (CT 257). This action focused almost singularly upon the proposition that the undisputed conduct of the officers was unreasonable and the charge to the jury concerning the liability of the police officers to the defendant employed this standard (Appendix C-3—C-6). The instructions of the trial Court however blurred the distinction between probable cause and the qualified immunity of the involved police officers.

The District Court instructed the jury that an inhabitant of the United States has a right to be free from an arrest made without probable cause (RT 4149-50; Appendix C-1, C-2). The Court instructed the jury on probable cause in the following manner:

> "Now reasonable or probable cause for arrest is generally defined to be such state of facts as would lead an officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person in question is guilty of a crime." (24 RT 4150:11 4151:20.) (Appendix C-3.)

Defendants objected to the court's instructions on probable cause, contending that while the jury determines the facts, it is the court's duty to instruct the jury as to what facts, if true, would constitute probable cause (CT 240, 242, 279, 281; 19 RT 3226). 2/

It seems to Petitioners that no unlawful deprivation of liberty could have occurred in this case if probable cause were to exist under state law and the state law defining probable cause satisfied constitutional requirements. Nevertheless the trial judge in this case refused to instruct pursuant to the California standard by which a jury is to determine probable cause when a person claims to have been falsely arrested or falsely imprisoned. Had the instruction which the District Court read to the jury been given in a state court false arrest or false imprisonment case it would have constituted reversible error. (***Ball v. Rawles***, 93 Cal. 222, 28 Pac. 937; ***Aitken v. White***, 93 Cal.App.2d 134, 208 P.2d 788; ***Roberson v. J.C. Penney Co.***, 136 Cal.App.2d 1,288 P.2d 275; ***Gibson v. J.C. Penney Co.***,

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2/ Plaintiff also objected to the court's probable cause instructions, but on the ground that the facts were essentially undisputed and therefore the court should have decided as a matter of law whether probable cause existed (CT 256-57, 292-93; 19 RT 3225-3243). Defendants agreed that the material facts were undisputed and urged that the court should have decided as a matter of law that probable cause existed (CT 272-73; CT 340).

165 Cal.App.2d 640, 331 P.2d 1057; and *Whaley v. Johnsen*, 208 Cal.App.2d 222, 25 Cal.Rptr. 184.)

Defendants proffered the following instruction on the issue of probable cause which was refused by the trial court:

> "To constitute reasonable cause for the arrest of Plaintiff in this case, the evidence must establish that Sergeants Varney and Nuckles had information that:
>
> "1. Plaintiff had been seen with Linda Miller between 4:00 and 5:30 a.m., on October 18, 1973 leaving the Parasol Restaurant.
>
> "2. Linda Miller's car had been seen parked at the corner of Topsail and Pacific on a day prior to her body being discovered.
>
> "3. Linda Miller's body was discovered at approximately 7:20 a.m., on October 19, 1973, at 33 Reef Street.
>
> "4. The coroner believed that Linda Miller could have been killed between 4:00 and 7:00 a.m. on October 18, 1973.
>
> "5. Linda Miller did not appear at her place of employment as she was scheduled at 8:00 p.m., on October 18, 1973.
>
> "6. Plaintiff knew that the police were looking for him and did not come forward.
>
> "If you find from all of the evidence that Sergeants Varney and Nuckles were possessed of the foregoing information, you must find that there was reasonable cause to arrest the Plaintiff.
>
> "If you find that Sergeants Varney and Nuckles were not possessed of the foregoing information,

> you must find that there was not reasonable cause to arrest him." (CT 281.)

This instruction was based on the well settled California law in *California Jury Instructions — Civil* (BAJI) (6th ed. 1977) section 6.86, p. 253. The Comment to BAJI 6.86 states:

> "Whether there was reasonable cause for an arrest is a question of law. When the facts are admitted or not controverted, the question is to be determined by the court alone. When the facts are controverted or the evidence is conflicting, the jury must be instructed as to what facts, if established, constitute reasonable cause. Only the question of the existence of such facts should be submitted to the jury. It is error to give the jury a definition of reasonable cause and to instruct them to determine if the facts are within or without that definition. [Citations.]

(*See Glannis v. City and County of San Francisco* (1978) 78 Cal.App.3d 219, 225.)

The California rule is in accord with the overwhelming weight of authority. It is a well-established common law principle that the judge, not the jury, determines whether probable cause exists in a civil suit for false arrest or imprisonment or malicious prosecution. (*See* Annotation (1963) 87 A.L.R.2d 183; 32 Am.Jur.2d False Imprisonment (1967) §8, p. 79; 52 Am.Jur.2d Malicious Prosecution (1970) §§184-86, pp. 303-06; W. Prosser, *The Law of Torts* (4th Ed. 1971) 846-47; *Restatement (Second) of Torts* (1965) §119, Comment (k), p. 198, §673, Comment (e), pp. 449-50, (1977) §674, Comment (h), p. 456; *Seaboard Oil Co. v.*

Cunningham (5th Cir. 1931) 51 F.2d 321, 325; *Sanders v. Palmer* (2d Cir. 1893) 55 F. 217, 220.) [3]

This rule has been approved by this Court in cases involving federal questions. In *Stewart v. Sonneborn* (1879) 98 U.S. 187, 194, 25 L.Ed. 116, 119, plaintiff brought an action in federal court alleging that defendants had maliciously and without probable cause filed a petition to declare plaintiff a bankrupt and take possession of his estate. The trial court directed a verdict on liability and left only the question of damages to the jury. The Supreme Court reversed, ruling, *inter alia*, that the failure of the bankruptcy proceeding was not conclusive on the issue of probable cause to institute the proceeding. The Court said:

> "It is, therefore, generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause, or that they do not."

In *Director General of Railroads v. Kastenbaum* (1923) 263 U.S. 25, 28, 4 S.Ct. 52, 68 L.Ed. 146, 148, an appeal from

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3/ Under common law tort principles, plaintiff's action was a combination of false arrest, false imprisonment and malicious prosecution. An unlawful arrest may give rise to a cause of action for either false arrest or false imprisonment, the essence of both, as earlier stated, being deprivation of liberty without lawful justification. If imprisonment is under the authority of judicial proceedings, however, the tort would be malicious prosecution. (*Vernon v. Plumas Lumber Co.* (1925) 71 Cal.App. 112, 127; 32 Am.Jur.2d False Imprisonment (1967) §§1-2, 4, pp. 74-77; 52 Am.Jur.2d Malicious Prosecution (1970) §3, p. 188; W. Prosser, *The Law of Torts* (4th Ed. 1971) §49, 835.)

a judgment on a verdict for false imprisonment against an officer of the United States, the government contended that the good faith of its agent in making an arrest must be conclusively presumed, and therefore a complete defense of probable cause is always made out. This Court held that good faith is not enough to constitute probable cause; good faith must be grounded on facts within the government agent's knowledge which in the judgment of the court make his good faith reasonable.

> "The question is not whether he thought the facts to constitute probable cause, but whether the *court* thinks they did. [Citation omitted.] Probable cause is a mixed question of law and fact. The court submits the evidence of it to the jury, *with instructions as to what facts will amount to probable cause if proved. Stewart v. Sonneborn*, 98 U.S. 187, 194, 25 L.Ed. 116, 119 . . .." (Emphasis added.)

The rationale for the rule is best expressed in *Ball v. Rawles* (1892) 93 Cal. 222, 228-29, as follows:

> "It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the right to cause the arrest of the offender. For the purpose of protecting him in so doing, it is the established rule, that if he have reasonable grounds for his belief, and act thereon in good faith in causing the arrest, he shall not be subjected to damages merely because the accused is not convicted. This rule is founded upon grounds of public policy, in order to encourage the exposure of crime, and when the

> acts of the citizen in making such exposure are challenged as not being within the reason of the rule, *the court, as in every other case involving considerations of public policy, must itself determine the question as a matter of law, and not leave it to the arbitrament of a jury.*" (Emphasis added.)

This rationale should be as applicable to a federal civil rights suit as it is to a common law tort action for false arrest or imprisonment or malicious prosecution. "[T]he details of constitutional tort actions should be shaped by reference to the parallel common law." (*Dellums v. Powell* (D.C. Cir. 1977) 566 F.2d 167, 175, citing *Pierson v. Ray* (1967) 386 U.S. 547, 556-57, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288, 296.) The same consideration of the public interest in effective law enforcement which led the Supreme Court in *Pierson v. Ray* to incorporate common law principles of immunity into Section 1983, also requires adoption of the common law principle that the judge, not the jury, decides what facts constitute probable cause in a civil rights case.

If the principles of reasonableness (i.e., prudence and ordinary care) are to be determined by a jury in arriving at an assessment of probable cause without any further guidance from the Court what can be the difference between probable cause and the qualified good faith immunity? The District Court's instructions in this case required the jury to determine (with respect to probable cause) whether the officers suspicions regarding Smiddy were reasonable, and then to determine (with respect to the good faith question) whether the officers had a reasonable belief that there was probable cause. In the final analysis they are the same test framed in each instance in a slightly different fashion. This Court has not to date confronted the essential difference between these two concepts under the

circumstances posed by this case. It is of immense importance to both Plaintiffs and Defendants in §1983 cases that the Court address such a question.

In *Pierson v. Ray* (1967) 386 U.S. 547, it was held that both the common law defense of probable cause and, in addition, the good faith qualified immunity were available to police officers who had arrested plaintiffs under a state law later found constitutionally invalid. On remand from this Court's 1971 *Bivens* case *supra* the Second Circuit also indicated that two defenses were available to law enforcement officers in §1983 actions: (1) probable cause and (2) good faith reasonable belief in the constitutionality of their actions (456 F.2d 1339, 1348).

Petitioners submit that the implication of cases such as *Pierson* and *Bivens* is that an instruction concerning the reasonableness of the officers beliefs *and* an instruction regarding the enumerated facts which would constitute probable cause should be posed to a jury which is called upon to pass upon a police officer's conduct in a case such as this.

In the Ninth Circuit however the rule for determining probable cause differs from that in all the authorities which Petitioners have above set forth. It is currently the law in the Ninth Circuit that the issue of probable cause may be determined in the manner that the trial court in this case instructed the jury. This proposition was first adumbrated in *Gilker v. Baker* (9th Cir. 1978) 576 F.2d 245, 247, and was reaffirmed in the case at bar. The Eighth Circuit also determines probable cause in the manner employed by the District Court in the instant case since in *Linn v. Garcia* (8th Cir. 1976) 531 F.2d 855 at 863, the panel discussed a probable cause instruction and then stated, "[t]he first paragraph of the instruction simply defined 'probable

cause' in conventional and acceptable terms and was proper." This Eighth Circuit position on the question of probable cause in §1983 actions is also set forth in *Giorano v. Lee* (8th Cir. 1970) 439 F.2d 1227, 1231, and was again reaffirmed in *Nix v. Sweeney* (8th Cir. 1978) 573 F.2d 998, 1001-2.

The position of the Eighth and Ninth Circuits upon the issue of probable cause however may differ from decisions in several other Circuits. The Seventh Circuit in a case determining probable cause as a matter of law followed the rule urged by Petitioners in §1983 actions, employing the enumeration of specific information the existence of which would establish probable cause. (*See Banish v. Locks* (7th Cir. 1969) 414 F.2d 638, 641-42), and this appears to be the method employed in the probable cause determination in the Fifth Circuit in *Nesmith v. Alford* (5th Cir. 1963) 318 F.2d 110, 123, 125. *See for example* n.22 at 318 F.2d 123). In *Montgomery Ward Inc., vs. Freeman* (4th Cir. 1952) 199 F.2d 720, 724, the Fourth Circuit in stating that the respective role of the Court and the jury should not differ whether the case be one for false imprisonment or malicious prosecution held that:

> ". . . if the facts leading to the prosecution are undisputed and lead to only one inference, the question of probable cause is to be decided by the court; *but if the facts are in dispute or are susceptible of several inferences which lead to different conclusions, it is the duty of the judge to submit their credibility to the jury with instructions that the facts found do or do not amount to probable cause.*"

Apparently having had some difficulty with the question, the Court of Appeals' opinion characterizes the probable

cause question in this case to be a "close issue" (Appendix A-6). The California Municipal Court in Smiddy's criminal case also must have found the probable cause issue to be a close one since after a hearing on the issue lasting four days it found that there was probable cause to believe that Smiddy committed the crime with which he was charged. The Superior Court however later dismissed the case against Smiddy pursuant to §995 of the California Penal Code for insufficient evidence.

If three learned judges in the United States Court of Appeals feel that the probable cause issue was a "close issue" and the Los Angeles Municipal Court felt probable cause actually existed how much greater is the dilemma faced by these police officers who cannot be expected to possess the innumerable years of learning and specialized legal training of these members of the judicial branch. Here, the police officers believe that there was probable cause. In fact they testified that to this day they are still of the opinion that Gary Smiddy killed Linda Miller (8 R.T. 1159-1160; 8 R.T. 1236). However, the jury was required to determine the reasonableness of this belief under an otherwise totally standardless guide. The very least to which law enforcement officials should be entitled with respect to an issue as close as this one is a probable cause instruction in accord with the law of their state and the overwhelming weight of American authority.

The District Court's charge to the jury concerning probable cause under the rule approved in the Eighth and Ninth Circuits requires the jury to determine the presence or absence of probable cause on the basis of the vague general language of a test designed to guide judges in their rulings upon the law rather than jurors in factual disputes. Requiring jurors to determine liability under these circumstances

through so abstract a legal definition is to place upon them the responsibility to decide an issue of law over which judges frequently disagree.

Probable cause involves two questions — one legal and one factual. The trial Court's charge to the jury in this case on the issue of probable cause permitted the jury to decide both of these questions. The instruction thus violated the respective functions of the Court and jury and in effect allowed the jury to determine which facts would, if they existed, constitute probable cause, as well as the actual existence of those facts.

Petitioners see the concept of what does or does not constitute probable cause to arrest as the single most important question addressed in most §1983 actions arising in false arrest false imprisonment contexts. The apparent disparity in the way different federal circuits decide this question simply cannot be allowed to continue. This Court must decide this question to provide the Federal judicial system with a uniform rule by which probable cause in §1983 actions is determined.

Petitioners therefore urge this Court to grant certiorari based on the substantial importance and significance of this question as well as to resolve the apparent disparity of treatment which may exist depending on the particular Circuit in which an alleged arrest without probable cause may occur.

III.

THIS COURT SHOULD ESTABLISH A STANDARD TO CORRECT THE CURRENT DISPARATE TREATMENT BY THE VARIOUS CIRCUITS CONCERNING THE QUESTION OF WHETHER TO REMAND FOR A PLENARY OR PARTIAL RETRIAL WHEN CAUSATION AND DAMAGES HAVE BEEN ERRONEOUSLY DETERMINED

The opinion in the Ninth Circuit below held that the trial judge erred in permitting the jury to find the officers liable for injuries to Plaintiff flowing from the prosecutor's independent judgment to charge the Plaintiff and the Municipal Courts independent judgment to bind the Plaintiff over to Superior Court. The case involved close questions concerning negligence and the presence or absence of probable cause. Petitioners are of the opinion that if negligence is the basis of liability in this case, Plaintiff would have to prove the four elements of negligence, i.e., duty, breach, causation and damages (Prosser, *Law of Torts*, (1971) §30, p. 143). Error in the determination of any of these elements would seem to Petitioners to require a retrial as to all of them unless it clearly appeared by use of special verdicts or otherwise that the jury's determination of the erroneously instructed element could not possibly have influenced any of the others. In the case at bar their was only a general verdict and it would require rank speculation to attempt to predict how the jury would have held had it been provided the proper law concerning causation. Where particularly close questions are involved as in this case a new trial as to all issues is the commended practice and this was Petitioners' contention in its Petition for Rehearing in the Court of Appeals below.

This Court's decision in *Gasoline Products Co. v. Champlin Refining Co.* (1930) 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188, fifty-two years ago requires that when issues of damages and liability may be sufficiently interwoven that the submission of one without the other could create confusion and uncertainty, there should be a new trial of all of the issues (283 U.S. at 500). The disparity in how differing circuits treat this question however is not in how much lip service is given this half century old case — most circuits addressing the problem mention the case — but how strict a test is actually employed in granting a partial retrial on limited issues where the original trial posed close questions on other issues.

Petitioners feel that only the Third and Fifth Circuits appear to correctly apply the strictures of the *Gasoline Products* case with any regularity. It appears that the Fifth Circuit is more loathe than some other circuits to permit a partial retrial on remand in cases where the trial court erred on an issue respecting damages or proximate cause. For example the Fifth Circuit has consistenlty granted a complete retrial when a close question has been presented in connection with other errors or where the error has occurred with respect to causation and damages. (*Fury Imports v. Shakespeare Co.*, (5th Cir. 1977) 554 F.2d 1376, 1388; *Williams v. Slade* (5th Cir. 1970) 431 F.2d 605, 608; *see also Hatfield v. Seaboard Air Lines Railroad Co.* (5th Cir. 1968) 396 F.2d 721, 723-24; *Vidrine v. Kansas City Southern Railway Co.* (5th Cir. 1972) 466 F.2d 1217, 1221 n.3.)

If the present case had been heard in the Fifth Circuit the close issue of probable cause coupled with the erroneous standard regarding causation would likely have persuaded a panel in that Circuit to order a full retrial. (*See*

for example the standard employed in *Vizzini v. Ford Motor Co.* (5th Cir. 1977) 569 F.2d 754, 760-61.) On the other hand the Tenth Circuit recently granted only a partial retrial on the sole issue of liability in a negligence case because of an erroneous foreseeability instruction (*Bosse v. Litton Unit Handling Systems* (10th Cir. 1981) 646 F.2d 689), and the Ninth Circuit recently provided for only a limited retrial where it found the trial court had erred in its proximate cause analysis (*Lies v. Farrel Lines Inc.* (9th Cir. 1981) 641 F.2d 765, 774).

The Court of Appeals' opinion indicates that on remand it must be redetermined whether the Plaintiff suffered any damages as a result of his arrest (Appendix A-13). Thus Varney, Nuckles and Inglin are now placed in the anomolous situation in which they are conclusively liable to Smiddy where neither the element of causation or damages has been satisfied. It is unfair to require defendants to defend this action with the jury being instructed that defendants are absolutely liable even though the element of causation may not exist. The confusion and uncertainty which such a result would create is precisely what the *Gasoline Products* case and cases arising in the Fifth Circuit have cautioned against. This Court should settle this disparity of treatment in the various Circuits, and hold that when causation is erroneously determined, such error normally will not be remedied by a mere partial retrial on damages.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court grant a writ of certiorari and set aside that portion of the Judgment of the Court of Appeals which affirms the District Court on the issue of the Defendants liability to the Plaintiff.

DATED: May 20, 1982.

Respectfully submitted,

IRA REINER, City Attorney of Los Angeles

JOHN T. NEVILLE, Senior Assistant City Attorney

RICHARD M. HELGESON, Assistant City Attorney

Attorneys for the Petitioners, DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN

APPENDIX A

APPENDIX A

OPINION OF THE COURT OF APPEALS, 665 F.2d 261

Gary D. Smiddy, Plaintiff-Appellee v. Dudley D. Varney, Sidney J. Nuckles, Raymond D. Inglin, Gaston Herrera, Jesus C. Aguilar, The City of Los Angeles, California, a Chartered City, and the County of Los Angeles, California, Defendants-Appellants. Nos. 79-3078, 79-3480.

United States Court of Appeals, Ninth Circuit, decided August 7, 1981, as amended on Denial of Rehearing and Rehearing En Banc December 21, 1981.

Michael Lightfoot, Los Angeles, California, for Smiddy; Carla M. Woehrle, Talcott, Vandevelde & Woehrle, Los Angeles, California, John H. Bisbee, Bisbee & Nagan, Macomb, Ill., on brief.

Tom Todd, Kentfield, California, for Varney, etc.

Appeal from the United States District Court for the Central District of California.

Before WALLACE and SNEED, Circuit Judges, and CLAIBORNE*, District Judge.

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* Honorable Harry E. Claiborne, Chief Judge of the United States District Court for the District of Nevada, sitting by designation.

SNEED, Circuit Judge:

Gary Smiddy was arrested in 1973 and charged with the murder of Linda Miller. After the charge was dropped for insufficient evidence, he brought suit under 42 U.S.C. §1983 against employees of the Los Angeles Police Department. After trial, the district court entered judgment on a jury verdict awarding him $250,000. The district court added $250,000 in attorney's fees. The appellants, two sergeants and a polygraph examiner, challenge the judgment on numerous grounds. We reject their arguments that the district court should have directed a verdict in their favor and that the jury instructions were improper. But we conclude that the district court erred in refusing to hold that they were not liable for damages incurred after a district attorney, exercising his independent judgment, filed charges. We therefore reverse and remand for a new trial on the issue of damages. On remand, a reconsideration of the amount of the attorney's fees also will be necessary.

I.

FACTS AND BACKGROUND

Linda Miller's body was found on Friday morning, October 19, 1973, at approximately 7:30 a.m., in the storage room of a construction site in the Venice area of Los Angeles. She had been strangled. She was last seen alive in public at about 5:00 a.m. Thursday morning, when she left a coffee shop with Gary Smiddy. Smiddy claims they went from the coffee shop to his apartment in separate cars, where they stayed until she left on Thursday afternoon. Smiddy was with friends from about 5:00 p.m. Thursday until Miller's body was discovered.

Defendants Varney and Nuckles, experienced homicide investigators, arrested Smiddy on November 15, 1973. At that time they knew that Miller had last been seen with Smiddy, that she had not reported to her job as a waitress on Thursday evening, and that she was found dead wearing the same clothes she had on when she left the coffee shop. They thought Smiddy might have murdered Miller after leaving the coffee shop at 5:00 a.m. Thursday morning and before workmen arrived at the construction site at 7:30 a.m. that day. A coroner, Dr. Gaston Herrara, said that she could have been dead for 30 hours before her body was discovered. Other information pointing toward Smiddy was that a neighbor had reported that Miller's car was parked near the construction site for a few days before it was found, a sergeant who observed the body at the construction site told Varney and Nuckles that the smell indicated that she had been dead for about a day, and a construction foreman said the body could have been in the storage room Thursday without being discovered. In addition, they had been told that Miller referred to Smiddy as "John" at the coffee shop, which was significant because she had told a number of persons that she was afraid of a man named John with whom she lived and who she said had threatened her. Also, although the police officers had been told that Smiddy knew they would like to speak with him, he had not contacted them.

The Plaintiff produced an array of evidence at trial designed to show that it was unlikely that he killed Miller and that Varney and Nuckles conducted their inquiry negligently. For example, the autopsy revealed that Miller had eaten spaghetti shortly before her death, but no one at the coffee shop remembered her eating spaghetti before she left with Smiddy. Her car was parked illegally and received

a ticket on Friday morning but none on Thursday, making it unlikely that her car had been parked near the construction site that day. A construction worker told them it was inconceivable that Miller's body was in the storage room all day Thursday. And someone who was shown Miller's picture thought she had been in a bar Thursday night. The Plaintiff also argued that Varney and Nuckles should have examined scientific evidence such as blood found in the storage room and seminal fluid found in Miller's vagina more carefully.

Perhaps most persuasively, the Plaintiff argued that Varney and Nuckles failed to investigate other suspects adequately, including two former boyfriends named John. Miller had moved out of her apartment because a former boyfriend was harassing her, and she had told a number of friends that the former boyfriend had said that if he could not have her then no one could. The Plaintiff presented evidence at trial that a man named John Cook, whom Varney and Nuckles never contacted, made that statement. The Plaintiff also argued that the investigation of John Scroggin was deficient. Miller had lived with Scroggin in San Luis Obispo, and he had reportedly beat her and followed her to Los Angeles. Varney and Nuckles did investigate Ronald Varella, who had also lived with Miller and reportedly beat her. Smiddy complained because Varney and Nuckles dropped their investigation of Varella after they arrested him.

The Plaintiff also suggested at trial that the police officers should have investigated Steve Dunne, who might have had a date scheduled with Miller on the night before her body was found, and Andy Rawn, with whom Miller had engaged in oral sexual relations at lunchtime on the Wednesday before her death, more carefully. The Plaintiff

argued that Dunne had lied to the police officers and that Miller may have attempted to blackmail Rawn, warranting further investigation of each.

The day after Varney and Nuckles arrested Smiddy, Defendant Inglin administered a polygraph examination of him. Inglin was the president of the California Association of Polygraph Examiners at that time. A deal had been struck such that the police would release Smiddy if he passed the test, but Inglin concluded that Smiddy responded to his questions deceptively. In response to complaints about his examination of Smiddy, Inglin appointed a committee of past presidents of the Association in 1974 to evaluate the examination. The committee concluded that the test was administered deficiently, and the Association subsequently censured Inglin for the way he tested Smiddy.

On November 19, 1973, four days after the arrest, the district attorney filed a criminal complaint charging Smiddy with the murder of Linda Miller. A preliminary hearing was held in municipal court, and Smiddy was bound over to the superior court on December 14. The superior court dismissed the complaint for insufficient evidence on January 23, 1974.

Smiddy filed this section 1983 suit in 1976, alleging that the arrest and incarceration violated his civil rights. Following a lengthy jury trial in 1978, he was awarded $250,000 in damages from Varney, Nuckles and Inglin. The jury found that the coroner, Dr. Herrera, was not liable to Smiddy. [1/] The district court awarded the Plaintiff

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1/ Another coroner, Jesus Aguilar, had been dismissed from the case previously. The Plaintiff also named the City and County of Los Angeles as defendants in his complaint. Smiddy only sought equitable relief against the municipal defendants. After trial, the court granted Plaintiff's motion that they expunge from their files all records of Smiddy's arrest. We note

(continued)

$250,000 in attorney's fees under the Civil Rights Attorney's Fees Act of 1976, which amended 42 U.S.C. §1988 to permit courts to award reasonable attorney's fees to the prevailing party in section 1983 actions. Varney, Nuckles and Inglin appeal.

II.

THE MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT

Varney and Nuckles requested a directed verdict in their favor at the close of evidence, arguing that the evidence showed that probable cause existed for Smiddy's arrest as a matter of law. Inglin requested a directed verdict on the theory that his polygraph examination was not a proximate cause of Smiddy's damages. These requests were renewed in motions for judgment notwithstanding the verdict. We hold that the district court correctly denied these motions.

Whether probable cause existed for Smiddy's arrest is a close issue. But in reviewing the denial of a directed verdict in favor of a defendant, we must view the evidence in a light most favorable to the Plaintiff. *Mahau v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977). Giving the

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1/ (continued) that if this case were brought today the Plaintiff would likely seek damages from the municipal defendants. *See Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipal corporations may be liable under section 1983 if injury resulted from a governmental policy or custom); *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (municipal corporations are not protected in section 1983 suits by the immunities of their employees).

Plaintiff the benefit of all reasonable inferences that may be drawn from the evidence presented during the course of the twenty-three day trial, sufficient evidence existed to support the jury's conclusion that there was no probable cause for the arrest.

It is not possible to summarize concisely all of the evidence presented on this issue since much of the trial was devoted to the issue of whether probable cause existed. But, as indicated above, there was conflicting evidence about what the police officers knew and what other leads they should have pursued. In *Gilker v. Baker*, 576 F.2d 245 (9th Cir. 1978), we stated that if "reasonable persons might reach different conclusions about the facts, the establishment of those facts is for the jury, and the existence of probable cause is likewise for the jury, upon a proper instruction about the law." *Id.* at 247. The district court was correct under this standard in submitting the issue to the jury, which decided the issue in favor of Smiddy. We will not upset that decision.

Nor can we say that there was not sufficient evidence to conclude that Inglin's polygraph examination was a proximate cause of Smiddy's damages. Inglin argues that even if his examination had been conducted properly the results would have been inconclusive. But it is not clear what Varney and Nuckles would have done had Inglin reported that the test was inconclusive. Varney testified that Inglin's conclusion that Smiddy was deceptive was a factor in the decision to hold him. Therefore, sufficient evidence existed to support the jury's conclusion that the polygraph examination was a proximate cause of Smiddy's continued incarceration, and the district court did not err in refusing to direct a verdict in Inglin's favor.

III.

THE JURY INSTRUCTIONS

The sergeants and Inglin both challenge the jury instructions. Our standard of review is that we will reverse a judgment because of a mistake in jury instructions only if the error was prejudicial. We look to the entire jury charge, which in this case was quite lengthy, to determine whether the instructions fairly stated the legal principles to be applied by the jury. *Sanderson v. Chapman,* 487 F.2d 264, 267 (9th Cir. 1973); *Nitto Shosen K. K. v. Johnson,* 350 F.2d 399, 400 (9th Cir. 1965). We conclude that the district court's jury instructions pass muster.

The court instructed the jury that Inglin could be found liable if he conducted and interpreted the polygraph examination improperly and rendered an incorrect conclusion. The jury was further instructed that Inglin could not be liable if he acted with a reasonable good faith belief that his conduct would not violate Smiddy's constitutional rights. Inglin complains that the instructions did not spell out the meaning of "improperly." But reading the instructions in their entirety, we conclude that it was clear that the jury was to use the appropriate "reasonably prudent person" test. Inglin also complains that an instruction should have been given that he was to be held to the "special skill and care" standard for experts and professionals. But it is not clear why he would want to be held to this higher standard, especially since he was censured by the California Association of Polygraph Examiners for the way he tested Smiddy.

The crucial issue concerning the instructions regarding Varney and Nuckles is whether the jury understood that

they might not be liable under section 1983 even if the jury concluded that probable cause for the arrest did not exist. Under *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), police officers have a qualified immunity under section 1983 such that they are shielded from liability if they reasonably believe in good faith that their actions are constitutional. *Id.* at 557, 87 S.Ct. at 1219. Thus, to recover the Plaintiff must clear two hurdles: probable cause must be shown not to have existed; the officers must be shown not to have reasonably believed in good faith that probable cause did exist. *See Allen v. McCurry*, ____ U.S. ____, 101 S.Ct. 411, 419 n.18, 66 L.Ed.2d 308 (1980); *Midwest Growers Cooperative Corp. v. Kirkemo*, 533 F.2d 455, 463 (9th Cir. 1976); *Mark v. Groff*, 521 F.2d 1376, 1379-80 (9th Cir. 1975). It is necessary that police officers be immune when they reasonably believe that probable cause existed, even though it is subsequently concluded that it did not, because they "cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves." *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 456 F.2d 1339, 1349 (2d Cir. 1972) (Lumbard, J., concurring).

The instructions in this case first defined probable cause and later stated: "[A] defendant who acts in good faith and with a reasonable belief that his conduct is constitutional, cannot be found liable under Section 1983." Therefore, although the "two-hurdle" requirement was not as sharply etched in the instructions as it might have been, the issues were fairly put to the jury, which must have concluded both that probable cause was lacking for Smiddy's arrest and that Varney and Nuckles did not reasonably believe in good faith that probable cause existed.

IV.

DAMAGES INCURRED AFTER THE DISTRICT ATTORNEY FILED THE CHARGE

At the close of the trial the Defendants moved for a partial directed verdict that they were not liable for any damages suffered after November 19, 1973 because the filing of the criminal complaint by the district attorney insulated them from liability for damages suffered subsequently. They repeated this argument in a Motion for Judgment Notwithstanding the Verdict and for a new trial. These Motions were denied. They also requested a jury instruction stating that the district attorney bears responsibility for gathering evidence to convict or exonerate an arrested person after the filing of a criminal complaint, and that instruction was denied.

The district court erred. Filing of a criminal complaint immunizes investigating officers such as the Appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest exists at that time. This presumption may be rebutted, however. For example, a showing that the district attorney was pressured or caused by the investigating officers to act contrary to his independent judgment will rebut the presumption and remove the immunity. Also the presentation by the officers to the district attorney of information known by them to be false will rebut the presumption. These examples are not intended to be exclusive. Perhaps the presumption may be rebutted in other ways.

Authorities from other circuits lend some support for this position. Thus it has been held that the filing of

charges under certain circumstances does break the chain of causation between an arrest and prosecution. *See Ames v. United States,* 600 F.2d 183, 185 (8th Cir. 1979); *Dellums v. Powell,* 566 F.2d 167, 192 (D.C. Cir. 1977); *Rodriguez v. Ritchey,* 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc). 2/

Thus, we hold that where police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted. This result is just because the other actors who decided to continue to hold Smiddy, the district attorney and the municipal court judge, are absolutely immune from liability under section 1983. *Imbler v. Pachtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128

2/ In *Rodriguez,* the plaintiff sued arresting officers for a false arrest pursuant to a grand jury indictment. The court held that the action should be dismissed, stating: "[I]f the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain. . . ." 556 F.2d at 1193. In *Dellums,* a false arrest verdict against a police chief was affirmed, but a malicious prosecution verdict was vacated and a new trial was ordered. The court stated: "The law is clear that the chain of causation is broken — thereby defeating tort liability — if the decision made by Attorney Moore [to prosecute] was independent of any pressure or influence exerted by Chief Powell. . . ." 566 F.2d at 192-93. And in *Ames,* the court, citing *Rodriguez* and *Dellums,* held that: "[A]bsent any specific allegation, such as the presentation of false evidence or the withholding of evidence, the grand jury indictment breaks any chain of causation linking the employees' activities to the institution of criminal proceedings, thus insulating the FBI and Justice Department employees from tort liability." 600 F.2d at 185.

(1976) (prosecutors); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.288 (1967) (judges). A police officer's lot already is unfortunate because it is he who often is the only actor in the chain of decisions leading to prosecution who is subject to section 1983 liability. We need not make it more unfortunate by holding the officer liable for damage that is the result of the intervening fault of others in the chain. The existence of the possiblity of absolute liability on the part of the municipality or governmental unit further underscores the justice of limiting the liability of the police officers. *See* Comment, *Strict Liability Under Section 1983 for Municipal Deprivations of Federal Rights?: Owen v. City of Independence*, 55 St. John's L.Rev. 153 (1980).

The Plaintiff argues that even if the filing of the criminal complaint normally insulates police officers from liability for subsequent damages, the Defendants have waived the argument in this case because they failed to plead it as an affirmative defense as required by Rule 8 of the Federal Rules of Civil Procedure. We disagree. In California, "Once the district attorney has filed a complaint, it is his responsibility to gather and present such evidence as will convict the guilty or exonerate the innocent." *Tribulski v. County of Los Angeles*, 83 Cal.App.3d 828, 831, 146 Cal.Rptr. 229 (1978). There is a presumption of independence on the part of the district attorney where Plaintiff has not presented evidence to challenge that presumption. For example, Plaintiff might contend that the prosecutor acted under pressure from the police or relied on the police investigation and arrest when he filed the complaint, instead of making an independent judgment on the existence of probable cause for the arrest. *See Ames, supra.* Where the plaintiff has introduced evidence to rebut the presumption, the burden remains on the defendant to prove that an

independent intervening cause cuts off his tort liability. Fed. R. Evid. 301. If for reasons of privilege or otherwise the relevant evidence is not available, no presumption will arise.

On remand, then, a new inquiry must be made into the issue of damages. At trial, the Plaintiff presented evidence concerning the damage he suffered as a result of his incarceration, including psychological damage and the loss of a prospective job. The jury returned a general verdict that did not specify how the award was calculated. We hold that the Defendants are liable for the damage suffered from the time of Smiddy's arrest until the district attorney filed the charges, approximately four days. But they are not liable for Smiddy's damages due to his incarceration from the time of the filing until his release on bail following the preliminary hearing, approximately four weeks, unless the Plaintiff rebuts the presumption of independence on the part of the district attorney. Whether the loss of the job opportunity was proximately caused by the arrest by the Defendants or the incarceration subsequent to filing of the charges is properly considered in the first instance by the trier of fact. Likewise, determining whether the arrest itself proximately caused any psychological damage must be considered on remand. *See Arnold v. International Business Machines Corp.*, 637 F.2d 1350, 1355-58 (9th Cir. 1981) (discussion of proximate causation and federal civil rights actions).

V.

ATTORNEY'S FEES

The Defendants do not challenge the amount of the attorney's fees award, which were designed to compensate the four attorneys who represented Smiddy at their normal rates of $65 to $100 an hour for professional legal work and $25 an hour for law clerks' time. Rather, they appeal the fact that an award was made. We reject their arguments. Nonetheless, we conclude that if damages are substantially reduced on remand the court should reconsider the amount of the attorney's fees award.

Our standard of review for an award of attorney's fees under 2 U.S.C. §1988 is the abuse of discretion standard. *Sethy v. Alameda County Water District,* 602 F.2d 894, 897 (9th Cir. 1979). Contrary to the Defendants' arguments, it is not an abuse of discretion for a district court to award attorney's fees because the Plaintiff was awarded damages, *id.*, accepted a contingent fee arrangement, *Buxton v. Patel,* 595 F.2d 1182, 1185 n.3 (9th Cir. 1979), or did not proceed by means of a class action, *id.* The district court must be guided by the factors listed in *Fountila v. Carter,* 571 F.2d 487, 496 (9th Cir. 1978). The district court in this case considered those factors, among which are the amount of damages involved and the results obtained. If on remand the amount of damages is reduced and thus the results obtained are less favorable to the Plaintiff, the district court should reconsider the amount of the attorney's fees award in light of all of the *Fountila* factors.

VI.

DISPOSITION OF APPEALS

The judgment of liability with respect to each appellant is affirmed, but the amount of the judgment is vacated, and the case is remanded for a new trial on the issue of damages to be conducted in accordance with this opinion. Following that trial a reconsideration of the amount of attorney's fees will be in order.

Affirmed in Part; Judgment Vacated and Remanded.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Gary Smiddy,

Plaintiff-Appellee

v.

Dudley D. Varney, et al.,

Defendants-Appellants.

Nos. 79-3078
79-3480

Filed February 25, 1982.
Clerk, U.S. Court of Appeals

Before: Wallace and Sneed, Circuit Judges, and Claiborne*, District Judge.

Appellants' petition for rehearing is denied.

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* Honorable Harry E. Claiborne, Chief Judge of the United States District Judge for the District of Nevada, sitting by designation.

APPENDIX C

APPENDIX C

RELEVANT PORTION OF THE DISTRICT COURTS CHARGE TO THE JURY ON THE ISSUE OF LIABILITY OF THE DEFENDANT POLICE OFFICERS TO THE PLAINTIFF

Ladies and gentlemen, Section 1983 of Title 42 of United States Code provides in part that any inhabitant of the United States may seek redress in this court, by way of damages, against any person who, under color of any law, statute, or ordinance subjects such inhabitant to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

Now, the statute just referred to is one of the Civil Rights Acts enacted by Congress under the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment to the Constitution provides that:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

You are instructed that an inhabitant of the United States has the constitutional right to be free from unlawful arrest, which means an arrest without probable cause made by a police officer acting under color of law.

Furthermore, an inhabitant of the United States has the constitutional right to be free from unlawful restrictions on his liberty imposed by any person acting under color of law, whether these restrictions take the form of actual custody or conditions of bail.

Now, you are further instructed that an arrest is made by an actual restraint of the person, or by submission to the custody of an officer.

The Plaintiff, Gary Smiddy, was placed under arrest by the Defendants Varney and Nuckles on November 15, 1973.

A peace officer may, without a warrant, lawfully arrest a person whenever the peace officer has reasonable or probable cause to believe that the person to be arrested has committed a felony.

An arrest based on probable cause does not violate constitutional rights.

California Penal Code Section 187 provides that murder is the unlawful killing of a human being with malice aforethought.

Murder is a felony.

Now, a false arrest or an unlawful arrest is the unlawful taking of a person into custody. False imprisonment is the unlawful violation of the personal liberty of another.

To constitute a false imprisonment, there must be an intentional and unlawful restraint, confinement or detention which compels the person to stay or go somewhere against his will.

Now, ladies and gentlemen, you are further instructed that the question of reasonable or probable cause for the arrest of Plaintiff is to be based on facts as they existed at

the time the arrest was made on November 15, 1973. Consequently, the final disposition of the murder charge, for which Plaintiff was arrested, should not be considered by you as having a bearing on the question of whether or not there was reasonable or probable cause to arrest him on November 15, 1973, because the test for reasonable or probable cause to arrest is not based on whether the evidence on which the officers acted was sufficient to convict.

Now reasonable or probable cause for arrest is generally defined to be such state of facts as would lead an officer of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person in question is guilty of a crime.

If a defendant under color of state law acts in good faith and with a reasonable belief under all the circumstances as they reasonably appeared to him that his conduct was constitutional, such a reasonable, good faith belief is a defense to an action brought under Section 1983 of Title 42, United States Code.

A defendant acts in good faith when he acts with a sincere, honest belief that certain information is true, and he acts in a manner that would be constitutional if the information were true, even though the information turns out to be incorrect.

A defendant under color of state law does not act in good faith if he knew, or reasonably should have known that the action he took within his sphere of official responsibility would violate a recognized constitutional right of the plaintiff, or if defendant acted maliciously with the intention to cause a deprivation of constituional rights to the plaintiff.

Plaintiff contends that Defendants Dudley D. Varney and Sidney Nuckles, while acting under color of state law as homicide investigators, did, without probable cause, subject Plaintiff unlawfully to an arrest, restraint and imprisonment.

Plaintiff also contends that Defendant Gaston Herrera, while acting under color of law as a Deputy County Coroner, did perform his duties and responsibilities as a forensic pathologist improperly by giving an incorrect opinion concerning the time of Linda Miller's death.

Plaintiff contends that the acts and conduct of Defendant Gaston Herrera were a contributing cause to Plaintiff's unlawful arrest, detention and imprisonment.

In addition, Plaintiff contends that Defendant Raymond Inglin, while acting under color of state law as a polygraph examiner for the Los Angeles Police Department, performed polygraph or lie detector tests on Plaintiff improperly, interpreted such tests improperly, and rendered incorrect opinions and conclusions regarding such tests.

Plaintiff further contends that the acts and conduct of Defendant Raymond Inglin were a contributing cause to Plaintiff's unlawful detention and imprisonment.

Defendants Dudley D. Varney and Sidney Nuckles contend that their arrest of Gary D. Smiddy was lawful in that it was based on reasonable and probable cause to believe that Plaintiff had committed a homicide, and that his subsequent detention and imprisonment were lawful.

Defendant Gaston Herrera contends that the procedures employed by him and the opinions rendered by him concerning the autopsy which he performed on the body of Linda Miller were proper.

Moreover Defendant Raymond Inglin contends that he properly performed polygraph or lie-detector tests that he gave to Plaintiff, and that the interpretations and opinions he rendered with regard to said tests were correct.

In addition, each Defendant contends that he acted in good faith and with a reasonable belief that his conduct was lawful and proper, and each Defendant denies that his conduct contributed as a proximate cause to any injury sustained by Plaintiff.

Plaintiff denies that the Defendants acted reasonably and in good faith.

Now, ladies and gentlemen, in a civil case, which this is, the party asserting the affirmative of an issue has the burden of proving it by a preponderance of the evidence.

In this case the Plaintiff has the burden of establishing, by a preponderance of the evidence all the facts necessary to establish a claim for damages under Section 1983 of Title 42, United States Code.

The elements necessary to establish Plaintiff's claim for damages in this case are:

(1) That the acts or conduct of Defendant, of which Plaintiff complains, were engaged in under color of state law. Each Defendant has admitted that he was acting under color of state law.

(2) That the acts and conduct of a Defendant, of which Plaintiff complains, were done in such a way or manner, or under such circumstances as to deprive the Plaintiff of the following recognized constitutional rights:

(a) The right of a person to be free from unlawful arrest; and that is an arrest not based

on reasonable or probable cause to believe that a person had committed a felony.

(b) The right of a person to be free from unlawful detention or imprisonment.

And the third thing that the Plaintiff is required to prove, or the third element is:

(3) That the Defendants' acts and conduct so done were the proximate cause of damage to Plaintiff.

If you find as to any or all of the Defendants that the Plaintiff has, through a preponderance of the evidence, established a claim for damages under Section 1983 of Title 42, United States Code, you must then determine whether any or all of these Defendants have established a valid defense so as to preclude them from being liable in damages.

As I indicated to you a few moments ago, a defendant who acts in good faith and with a reasonable belief that his conduct is constitutional, cannot be found liable in an action under Section 1983.

A defendant has the burden of establishing, by a preponderance of the evidence, all facts necessary to prove that he acted reasonably and in good faith. By a preponderance of the evidence is meant such evidence as when weighed with that opposed to it has more convincing force and the greater probability of truth.

In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who has the burden of proving it.

Although the burden is on the party who asserts the affirmative of an issue to prove his claim by a

preponderance of the evidence, this rule does not require proof to an absolute certainty, since such proof to an absolute certainty is seldom possible in any case.

In a civil action, such as this, it is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all of the evidence, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

Now an injury or damage is proximately caused by an act, or a failure to act whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the damage, and that the damage was either a direct result or a reasonably probable consequence of the act or omission.

This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing, or the conduct of only one person.

On the contrary, many factors or things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or damage; and, in such a case, each may be a proximate cause.

A public employee is not liable for an injury caused by the act or omission of another person. However, this does not exonerate a public employee from liability or injury proximately caused by his own negligent or wrongful act or omission.

Although there are four defendants in this action, it does not follow from that fact alone that if one is liable all are liable; or that if one is not liable, all are not liable. Each defendant is entitled to a fair consideration of his own

defense. It is not to be prejudiced by the fact, if it should become a fact, that you find against other defendants.

The instructions given govern the case as to each defendant insofar as they are applicable to that defendant. So the same effect as if he were the only defendant in the action, and regardless of whether reference is made to the defendant or defendants in the singular or plural form.

APPENDIX D

APPENDIX D

FEDERAL CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment 14, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Civil Rights Act of 1871, 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX E

APPENDIX E

SECTION 815.2 AND 820.4 OF THE CALIFORNIA GOVERNMENT TORT CLAIMS ACT

California Government Code Section 815.2

(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

California Government Code Section 820.4

A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

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No. 81-2155

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

DUDLEY J. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Petitioners,

vs.

GARY D. SMIDDY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE & WOEHRLE
727 West Seventh Street
Suite 430
Los Angeles, California 90017
(213) 622-4750

Counsel of Record for Respondent

JOHN H. BISBEE
BISBEE & NAGAN
137 North Lafayette Street
Macomb, Illinois 61455
(309) 833-1787

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether a claim based upon a plaintiff's warrantless arrest and detention without probable cause is cognizable under 42 U.S.C. §1983 regardless of the defendant's intent in causing the unlawful arrest and detention and regardless of the possible availability of alternative state remedies.

2. Whether the trial court's instructions to the jury on the issues of probable cause and good faith immunity properly reflected well-settled law regarding the jury's role in deciding disputed questions of reasonableness in federal civil rights actions.

3. Whether this Court should review the principle, uniformly accepted and applied by each of the various circuits, that an appellate court may remand a case for a partial retrial on the distinct and separable issue of damages where the issues concerning liability have been fairly litigated and properly determined.

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TABLE OF AUTHORITIES

Federal Cases

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Duncan v. Poythress,
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Fury Imports v. Shakespeare Co.,
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Pierson v. Ray,
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Wood v. Strickland,
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California Government Code, § 814 3

California Penal Code, § 995 3

Texts

Kamisar, LaFave and Israel,
Modern Criminal Procedure
(5th Ed. 1980) pp. 28-40 21

6A Moore's Federal Practice
Section 59.06 (2d ed. 1976) 34

Prosser, Law of Torts
(4th Ed. 1971) p. 313 37, 38

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No. 81-2155

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

DUDLEY D. VARNEY, SIDNEY J. NUCKLES and RAYMOND D. INGLIN,

Petitioners,

vs.

GARY D. SMIDDY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondent, Gary D. Smiddy, respectfully opposes the Petition for Writ of Certiorai filed herein seeking review of the judgment and opinion of the United States Court of Appeals for the Ninth Circuit issued on August 7, 1981 and amended on December 21, 1981.

STATEMENT OF THE CASE

On November 15, 1973, the respondent, Gary D. Smiddy, was arrested without a warrant at the direction of the petitioners Dudley Varney and Sidney Nuckles. Varney and Nuckles were officers of the Los Angeles Police Department who had been responsible for investigating the murder of a young woman, Linda Miller, whose body had been discovered on the morning of October 19, 1973.

The day after his arrest, a polygraph examination was administered to Smiddy by the petitioner Raymond Inglin, a Los Angeles Police Department examiner, following an agreement by the police that Smiddy would be released if he passed the test. Inglin concluded that Smiddy's responses on the examination were deceptive; he so advised Varney and Nuckles who then continued to hold the respondent in custody.

A criminal complaint was subsequently filed against Smiddy charging him with the murder of Linda Miller. The respondent was continuously incarcerated until December 15, 1973, when he was released on bond. On January 23, 1974, the complaint against him was dismissed in the Los Angeles County Superior Court pursuant to Cal. Penal Code §995 on the grounds that Smiddy "had been committed without reasonable or probable cause."

In October, 1976, Gary Smiddy filed the instant case under the provisions of 42 U.S.C. §1983 asserting that the actions of the petitioners had caused him to be deprived of his federal constitutional rights.[1/] Specifically, the respondent claimed that his arrest and detention had been

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1/ Prior to filing this federal suit, Smiddy submitted a claim based on the same facts to the City of Los Angeles pursuant to the California Tort Claims Act, Cal. Govt. Code §814, et seq. The respondent was unsuccessful in his efforts to find counsel to represent him in a false arrest action under that Act. [Reporter's Transcript (hereafter R.T.) 2471, 2568].

effected without probable cause, in violation of his rights under the Fourth Amendment as applied to the states through the Fourteenth Amendment.

A lengthy jury trial was conducted in the district court. The evidence presented by both sides to the case centered on the course of the petitioners' investigation leading to the respondent's arrest, detention and prosecution. With some notable exceptions,[2/] the evidence regarding the

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2/ For example, a significant conflict in the evidence arose when the petitioner Varney testified at trial that he had received information that a traffic officer responsible for ticketing illegally parked vehicles near the murder scene was a lazy worker who did not diligently patrol his assigned areas. [R. T. 976]. This testimony was offered to counter an important point regarding the reasonableness of the petitioners' conclusion that Smiddy had the opportunity to kill Linda Miller. In rebuttal, the respondent offered the testimony of the claimed source of Varney's information to the effect that he had never had such a conversation with Varney and that, in fact, the traffic officer in question was very conscientious in the performance of his duties. [R. T. 1637-38]. A similar dispute in the evidence concerned petitioners' testimony, offered in explanation of their failure to investigate an alternative murder suspect, that the individual in question was a "quiet, little guy" [R. T. 749, 1274]. The respondent produced testimony that the individual was a strong, well-built, six-foot-two. [R. T. 1286].

actions of the petitioners and the specific facts and items of information developed during their investigation was not disputed. The central controversy at trial concerned Smiddy's claim that the petitioners had so willfully distorted the facts and information available to them and had so recklessly and negligently conducted their investigation and examination procedures that they reached patently unjustified and unreasonable conclusions regarding the respondent's responsibility for the death of Linda Miller and, on the basis of those conclusions, caused the respondent to be arrested and detained without probable cause. A summary of the voluminous evidence and argument presented on these issues at trial is included in the opinion of the Court of Appeals set out in Appendix A to the Petition for Certiorari.

2/ (cont.)

The respondent argued at trial that these disputed points represented the kind of intentional distortion which characterized the petitioners' conduct throughout their investigation.

The jury returned a verdict finding the petitioners liable under §1983 and awarding the respondent damages in the sum of $250,000. The Court of Appeals for the Ninth Circuit affirmed the judgments of liability as to each of the petitioners, holding that the respondent had sufficiently established the absence of probable cause for his arrest and that the officers' "good faith" immunity defenses had been properly rejected by the jury. However, the court held that the petitioners should have been presumed to be immune from liability for any damages suffered by the respondent following the filing of the criminal complaint against him. The case was therefore remanded for a partial retrial to determine what portion of the respondent's damages were attributable to the period of time prior to the filing of the complaint.

SUMMARY OF ARGUMENT

I.

In Parrat v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), this Court held that a §1983 action alleging a deprivation of property without due process will not lie where state tort remedies provide a means of redress which satisfies the requirements of procedural due process. The petitioners' assertion that the instant case raises a substantial issue as to the scope of this Court's holding in Parrat is based on two fundamentally erroneous premises. First, petitioners inaccurately characterize this case as one involving "simple negligence." In fact, a substantial portion of the respondent's evidence and argument in the trial court concerned the intentional and reckless conduct of petitioners which resulted in respondent's unconstitutional arrest and incarceration, and no inference can be drawn that negligence was the sole basis for the jury's

finding of liability. Second, and more significantly, the petitioners fail to recognize that the instant case does not involve a bare due process claim such as that advanced in Parrat. Rather, it involves specific constitutional rights guaranteed by the Fourth Amendment that have been wholly incorporated within the Due Process Clause of the Fourteenth Amendment. The case law is well-established that state remedies need not be exhausted prior to pursuing such a §1983 action and that the federal remedy under §1983 for such deprivations supplements available state remedies. Thus, petitioners' argument that the instant case presents unanswered questions regarding the scope of this Court's holding in Parrat is without merit.

II.

The question of probable cause which arises in a §1983 action based on a claim of unlawful arrest and detention involves an evaluation of the reasonableness of police conduct in light of all the

surrounding facts and circumstances. Because of the nature of this inquiry, the courts have consistently held that the issue of probable cause in such an action should be decided by the jury unless the facts are undisputed and are not susceptible of differing inferences or interpretations. The petitioners' suggestion that the jury must be instructed in such a manner as to limit its function to finding the existence of specific facts while leaving the final probable cause determination to the court is contrary to this well-settled rule. Moreover, it is clear that any such instruction would have been inappropriate in this case because the central dispute involved the reasonableness of the petitioners' inferences and conclusions regarding probable cause rather than the existence of particular facts. Review by the Court on this issue is accordingly unwarranted.

III.

Federal appellate courts have consistently applied the principles enunciated in Gasoline Products Co. v. Champlin Refinery Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931) when determining whether a case should be partially or fully remanded for retrial. Case authority does not support petitioners' argument that the Gasoline Products standard has been subjected to disparate treatment among the circuits. Rather, the case law indicates that outcomes vary based upon the application of well-established standards to the particular circumstances and facts of each case. The limited remand in the instant case was clearly justified under such standards because the issue of the temporal apportionment of damages, the only basis upon which the judgment was reversed, is clearly distinct and separable from the settled issues of liability.

ARGUMENT

I

THE INSTANT CASE INVOLVING A §1983 CIVIL RIGHTS CLAIM BASED ON THE SPECIFIC CONSTITUTIONAL GUARANTEES OF THE FOURTH AMENDMENT DOES NOT POSE ANY ISSUE WARRANTING REVIEW BY THIS COURT

During its last term, this Court decided, with only a single partial dissent, the case of Parrat v. Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). That decision, which concerned a claim under 42 U.S.C. §1983 based on an alleged negligent deprivation of a prisoner's property, represented a logical and limited response to two difficult and recurring questions regarding the proper scope of §1983 litigation.

First, the Court in Parrat settled the question as to whether negligent conduct under color of state law could ever form the basis for liability under §1983, holding that nothing in the statute

requires a particular state of mind on the part of a defendant or precludes recovery where a defendant's negligence in fact deprives a plaintiff of some constitutional or statutory right. Id. at 534-535, 101 S.Ct. at 1912-1913. Secondly, the Court held that, with respect to a deprivation of property such as that alleged in the case before it, the defendant prison official's negligence did not represent a violation of constitutional proportions because the remedies afforded to the plaintiff by state law were sufficient to satisfy any Fourteenth Amendment due process interests implicated by the defendant's conduct or by the plaintiff's loss. Id. at 543-544, 101 S.Ct. at 1917. In so holding, the Court reasonably eliminated the possibility that every injury or deprivation of property, no matter how minimal or negligible, might become the subject of a federal civil rights action whenever a state official was involved.

The argument advanced by the petitioners here is that the instant case presents a substantial

issue regarding the scope of this Court's decision in Parrat as applied to cases involving the alleged negligent violation of due process rights. This argument is premised on two basic errors involving misinterpretation both of the nature of this case and of the fundamental analytical principles which underlie the Parrat decision.

First, the petitioners erroneously assume that the respondent's §1983 claim rested on an assertion of simple negligence by the petitioners in conducting the investigation and examination which led to Smiddy's arrest and incarceration. In fact, a substantial portion of the respondent's evidence and argument in the trial court concerned intentional and reckless conduct on the part of the petitioners involving the distortion and, in some instances, falsification of facts, a blatant disregard of basic fairness and professional standards, and a wilful indifference to Smiddy's rights and interests. As the petitioners recognize, at the time this case was decided the law in the Ninth

Circuit assumed that even a showing of mere negligence could support a §1983 claim. Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), reversed on other grounds sub nom, Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855, 55 L.Ed.2d 24 (1978). See Petition for Writ of Certiorari, p. 4 and Appellants' Opening Brief below, p. 70. Accordingly, neither the jury nor the Court of Appeals was required to draw any conclusion as to the specific state of mind of the petitioners, and no inference can be drawn that the finding of liability in this case was based on "simple negligence."

More importantly, the petitioners' argument regarding the potentially broad scope of the Parrat decision and its application to bar liability in this case fails to recognize the difference between a civil rights claim such as the respondent's, which is based on the specific constitutional guarantees of the Fourth Amendment as applied to the states through the Fourteenth Amendment, and a bare

due process claim such as that advanced in Parrat. The distinction is a crucial one; indeed, it provided the starting point for this Court's analysis in Parrat:

> The only deprivation respondent alleges in his complaint is that "his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." App., at 8. As such, respondent's claims differ from the claims which were before us in Monroe v. Pape, supra, which involved violations of the Fourth Amendment, and the claims presented in Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment.

See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2e (1962). Respondent here refers to no other right, privilege, or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment simpliciter. . . .

The Fourteenth Amendment protects only against deprivations "without due process of law." Baker v. McCollan, supra, 443 U.S. at 145, 99 S.Ct. at 2695. Our inquiry therefore must focus on whether the respondent has suffered a deprivation of property without due process of law. In particular, we must decide whether the tort remedies which the State of Nebraska provides as a means of redress for property deprivations satisfy the

requirements of procedural due process.

451 U.S. at 536-537, 101 S. Ct. at 1913-1914. See Paul v. Davis, 424 U.S. 693, 700-701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976).

Ignoring the significance of this basic permise underlying the scope and application of the Parrat decision, the petitioners argue that this Court should grant review in the instant case and should interpret Parrat in such a manner as to reach the conclusion that, because the State of California provides a tort remedy for persons subjected to common-law false arrest and imprisonment, no constitutional violation of the respondent's rights occurred when the petitioners caused his unlawful arrest and detention without probable cause. It is clear that such a proposition does not warrant consideration, much less adoption, by this Court.

It was long ago settled in the seminal case of Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473,

5 L.Ed.2d 492 (1961), that the existence of a cause of action under §1983 based on an alleged violation of Fourth Amendment rights does not turn on the availability of adequate remedial procedures under state law: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183, 81 S.Ct. at 482. Moreover, the Court in Monroe recognized that a §1983 claim arising out of a Fourth Amendment violation may properly be asserted without regard to the specific intent of the defendant state official. Id. at 187, 81 S.Ct. at 494. Cf. Baker v. McCollan, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).[3/]

3/ Baker held that an official's negligent failure to investigate the plaintiff's claims of misidentification following his arrest did not amount to a constitutional violation. The Court's analysis was specifically premised on the fact that the arrest was made pursuant to a valid warrant and that no Fourth Amendment issue was presented.

(cont.)

Nothing in this Court's decision in Parrat remotely suggests any divergence from either of these principles. To the contrary, Parrat's specific reliance on Monroe in reaching the conclusion that §1983 itself does not include any particular state of mind requirement, 451 U.S. at 534-535, 101 S.Ct. at 1912, and the Court's careful distinction, quoted above, of the specific Fourth Amendment claim in Monroe from the due process claim asserted in Parrat clearly acknowledge the continuing validity of the principles established in Monroe regarding Fourth Amendment §1983 actions.

The petitioners contend that, despite the fact that respondent's claim here was unquestionably

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3/ (cont.)

443 U.S. at 143-144, 99 S.Ct. at 2694. The petitioners' reliance on Baker as a "logical precusor" to the instant case (Petition for Writ of Certiorari, p. 9) is accordingly misplaced. See Powe v. City of Chicago, 664 F.2d 639, 644 (7th Cir. 1981) (where arrest is based on invalid warrant Baker does not apply to preclude liability).

based on the Fourth Amendment's specific guarantees against unlawful arrest and detention, the instant case should be governed by a different standard because, unlike the defendants' behavior in Monroe, the petitioners' conduct did not so sufficiently "shock the conscience" as to constitute a due process violation. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Again, the petitioners fail to appreciate the distinction between those specific constitutional rights which have been wholly incorporated within the Due Process Clause of the Fourteenth Amendment and the broader, but less defined, substantive "liberty" rights which have been held to arise out of the Due Process Clause itself. See, e.g., Rochin v. California, supra (stomach-pumping of suspect); Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) (excessive force by police officer); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981) (assault by state official); Hall v. Tauney, 621

F.2d 607, 613 (4th Cir. 1980) (corporal punishment). See generally Baker v. McCollan, supra, Blackmun J., concurring, 443 U.S. at 147, 99 S.Ct. at 2696; Kamisar, LaFave and Israel, Modern Criminal Procedure (5th Ed. 1980), pp. 28-40.

With regard to §1983 actions based on violations of the latter kind of due process rights, an issue may arise as to whether the adequate state remedy reasoning of Parrat should be applied to bar liability for substantive "liberty" deprivations as well as property deprivations. See Rutledge v. Arizona Board of Regents, supra; Meshkov v. Abington Township, 517 F.Supp. 1280 (E.D.Pa. 1981); Howse v. DeBerry Correctional Institute, 537 F.Supp. 1177 (M.D. Tenn. 1982).[4/] With

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[4/] This Court has granted a petition for review addressing the question of Parrat's applicability in a case involving a substantive due process claim based on a state's failure to follow its own statutory election procedures. Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), cert. granted, 50 U.S. L.W. 3668 (1982).

respect to a Fourth Amendment claim such as the respondent's, however, the Parrat procedural due process analysis is simply irrelevant.

Any doubt in this matter has clearly been resolved by the Court's recent decision in Patsy v. Florida Board of Regents, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (No. 80-1874, June 21, 1982). In that case, the Court held that there is no requirement that state administrative remedies be exhausted as a precondition to an action under §1983. The specific constitutional claim involved in Patsy was that the plaintiff had been denied employment opportunities on the basis of race and sex, in violation of her right to equal protection. No mention of Parrat is made in the opinion, and the Court squarely rejected the proposition that the adequacy and appropriateness of available administrative remedies should be considered in determining whether a §1983 claim may be asserted. Id. at ___, slip opinion, p. 1. This decision conclusively establishes the

essentially limited scope of the reasoning and the holding in Parrat. In light of this development, as well as the distinguishing factors previously discussed, the petitioners' suggestion that this Court should grant review in the instant case to consider the question of Parrat's applicability is patently without merit.

II

THE PARAMOUNT ROLE OF THE JURY IN DECIDING DISPUTED QUESTIONS OF REASONABLENESS IN §1983 ACTIONS IS WELL-ESTABLISHED AND UNIFORMLY ACCEPTED BY THE FEDERAL COURTS. THE INSTRUCTIONS IN THIS CASE PROPERLY SUBMITTED SUCH QUESTIONS TO THE JURY, AND NO ISSUE MERITING REVIEW BY THIS COURT IS POSED BY THOSE INSTRUCTIONS.

The respondent's §1983 claim in the instant case was based on his warrantless arrest and detention without probable cause in violation of the Fourth Amendment. The existence of probable cause was therefore at issue as an element of the

constitutional violation underlying the respondent's civil rights action.[5/] Moreover, since this Court's decision in Pierson v. Ray, 386 U.S. 547, 557, 87 S.Ct. 1213, 1219, 18 L.Ed.2d 288 (1967), it has been established that a defense of "good faith and probable cause" is available to a police officer in a §1983 suit based on a claim of unlawful arrest and detention. This defense is the counterpart of the more general principle of "good faith" qualified immunity recognized by this Court in other types of §1983 cases involving various kinds of governmental officials. Procunier v. Navarette,

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5/ The jury was accordingly instructed that an individual has a constitutional right to be free from an arrest without probable cause (Petition for Certiorari, Appendix C-1) and that an arrest based on probable cause does not violate any constitutional right (Appendix C-2). Where, as in the instant case, an arrest is made without a warrant, an affirmative showing of the existence of probable cause must be made in order to justify the arrest. Beck v. State of Ohio, 379 U.S. 89, 85 S.Ct. 223, 12 L.Ed.2d 142 (1964); United States v. Perez-Castro, 606 F.2d 251, 253 (9th Cir. 1979). See Gilker v. Baker, 576 F.2d 245, 246 (9th Cir. 1978); Martin v. Duffie, 463 F.2d 464, 469 (10th Cir. 1972).

434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed. 2d 24 (1978); Gilker v. Baker, 576 F.2d 245, 247 (9th Cir. 1978). See Glasson v. City of Louisville, 518 F.2d 899, 907-908 (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). The petitioners in this case asserted such a defense, thereby further placing in issue the question of probable cause.

The concept of constitutional probable cause is grounded in principles of reasonableness and prudence:

> 'Probable cause' for a warrantless arrest exists where facts known to the officers or about which they have reliable information are sufficient in themselves to warrant a man of reasonable prudence and caution in believing that a crime has been or is being committed by the person to be arrested. Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302 (1949); Carroll v.

United States, 267 U.S. 132, 162, 45 S.Ct. 280 (1925) . . .

Linn v. Garcia, 531 F.2d 855, 861 (8th Cir. 1976). See, Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225 L.Ed.2d 142 (1964). Where the probable cause issue arises in the context of a "good faith" defense to §1983 liability, objective reasonableness again provides the controlling standard. Pierson v. Ray, supra, 386 U.S. at 557, 87 S.Ct. at 1219; Gilker v. Baker, supra. Application of this standard necessarily requires an evaluation of all the facts and circumstances surrounding an arrest and a judgment as to the reasonableness of police conduct in light of those facts. See Wood v. Strickland, 420 U.S. 308, 321, 95 S.Ct. 992, 1000, 43 L.Ed.2d 214 (1975); Scheuer v. Rhodes, 416 U.S. 232, 247-248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974).[6/]

[6/] The petitioners suggest that some confusion exists as to the proper relationship of the issues of probable cause and qualified good faith (cont.)

Because of the nature of such an inquiry, it has consistently and uniformly been recognized that the issue of probable cause in a §1983 action is a matter to be resolved by the jury unless the facts, and the inferences to be drawn from the facts, are not disputed. As stated by the Court of Appeals for the Ninth Circuit:

6/ (cont.)

immunity in Fourth Amendment §1983 actions and that the Court should grant review in this case to clarify the difference between these issues. In fact, however, no such confusion appears in the case law. The two matters are certainly intertwined, as is indicated by the fact that the defense recognized in Pierson is characterized as one of "good faith and probable cause." 386 U.S. at 557, 87 S.Ct. at 1219. However, the courts have had no difficulty in appreciating the distinction that, even if as a matter of law constitutional probable cause did not exist so as to justify an arrest, a defendant may still avoid liability if he reasonably believed that the arrest was lawful. See e.g., Jaroslawicz v. Seedman, 528 F.2d 727, 732 (2d Cir. 1975); Boscarino v. Nelson, 518 F.2d 879, 882 (7th Cir. 1975); Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2d Cir. 1972) (on remand); as well as the Court of Appeals decision in the instant case (Petition for Certiorari, Appendix A-9).

> A determination of probable cause involves the weighing of many factors. When, as here, reasonable persons might reach different conclusions about the facts, the establishment of those facts is for the jury, and the existence of probable cause is likewise for the jury, upon a proper instruction about the law.

Gilker v. Baker, supra, 576 F.2d at 247. Accord, Nix v. Sweeney, 573 F.2d 998 (8th Cir. 1978), cert. denied, 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979); Linn v. Garcia, 531 F.2d 855, 861 (8th Cir. 1976); Draeger v. Grand Central, Inc., 504 F.2d 142, 144 (10th Cir. 1974); Giordano v. Lee, 434 F.2d 1227, 1230 (8th Cir. 1970), cert. denied, 403 U.S. 931, 91 S.Ct. 2250, 29 L.Ed. 2d 709 (1971); Beauregard v. Wingard, 362 F.2d 901, 903 (9th Cir. 1966). See Banish v. Locks, 414 F.2d 638, 641 (7th Cir. 1969).

Pursuant to this well-settled rule, the district court in the instant case submitted the

question of probable cause to the jury, instructing them as to the definition and meaning of that concept. (Petition for Certiorari, Appendix C-3). The jury was further instructed that an arrest based on probable cause was not unlawful and that the defendants could not be found liable if they reasonably believed, under all the circumstances, that their conduct was lawful. (Appendix C-2, C-3). The petitioners here argue that the Court should grant review in this case and hold that the instructions to the jury were erroneous because they did not limit the jury's role to the simple resolution of factual disputes and reserve to the court the ultimate conclusion as to what facts would legally establish probable cause. It is respectfully submitted that this suggestion is plainly without merit.

The essential premise of the petitioners' argument is that the probable cause issue should properly be decided by the court as a matter of law rather than by "the arbitrament of a jury."

Ball v. Rawles, 93 Cal. 222, 228-229 (1892). (Petition for Certiorari, p. 22). This proposition, however, is flatly contrary to the settled law that the issue of probable cause in a §1983 action must be submitted to the jury whenever the facts are disputed or are subject to different inferences or conclusions. See Gilker v. Baker and other cases cited, supra.

The petitioners' further contention that the jury in a civil rights action must be provided with an instruction setting forth the specific facts which, if true, would justify the arrest and directing that a finding of probable cause be made on that basis is equally unworthy of this Court's consideration. The petitioners rely on extensive citations to cases and authorities involving the common-law torts of false arrest and malicious prosecution. Their view of the limited role of the jury in such actions is based on strict principles of common law pleading and proof which severely restrict a plaintiff's right to recovery on such theories. See, e.g.,

Ball v. Rawles, supra, 93 Cal. at 229-230. Insofar as they might act to unduly burden or restrain a plaintiff, such principles are not appropriately applied in a §1983 case where remedies must be liberally construed and immunity from liability limited. Gomez v. Toledo, 446 U.S. 635, 638-639, 100 S. Ct. 1920, 64 L. Ed. 2d 572 (1980); Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980). Certainly, nothing in the decision of this Court or in the decisions of the lower courts holding that probable cause is a jury question in a federal civil rights action suggest that the jury's consideration of the issue is to be so circumscribed or that such a detailed and restrictive instruction is required. 7/

7/ Contrary to the petitioners' suggestion, the Courts of Appeals are not divided in their treatment of probable cause as a jury issue in §1983 actions. Banish v. Locks, 414 F. 2d 638, 641-642 (7th Cir. 1969), cited by the petitioners as an example of a probable cause determination "employing the enumeration of specific information the existence of which would establish probable cause" (Petition for Certiorari, p. 24), was a case in which the court decided probable cause on undisputed facts and wrote a memorandum of decision articulating the more important (cont.)

Moreover, an instruction directing the jury that it must find probable cause on the basis of specific facts would clearly have been inappropriate in the instant case. The central dispute at trial was not whether the petitioners did or did not possess specific items of factual information but rather whether the inferences and conclusions which they drew from those facts were reasonable under all the circumstances. This is precisely the kind of dispute contemplated by the federal courts when they have consistently recognized that the question of probable cause in a §1983 case should be decided by the jury in light of all the facts, applying ordinary principles of reasonableness and

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7/ (cont.)

factual bases for its conclusions. No question of jury instructions was addressed or considered in the case. The other two cases cited by petitioners to suggest some differing approach among the circuits clearly involved common-law tort actions rather than federal civil rights claims. Nesmith v. Alford, 318 F.2d 110, 123 (5th Cir. 1963); Montgomery Ward Inc. v. Freeman, 199 F.2d 720, 724 (4th Cir. 1952).

prudence. See, Gilker v. Baker, supra, 576 F.2d at 247; Nix v. Sweeney, supra, 573 F.2d at 1002; Giordano v. Lee, supra, 434 F.2d at 1231.[8/] It is therefore respectfully submitted that the petitioners' request for review on this issue should be rejected.

8/ The probable cause instruction proposed by the petitioners in the trial court (Petition for Certiorari, pp. 18-19) demonstrates how inapplicable their argument is to the present case. The instruction listed five specific items of information, the first being that the respondent was seen leaving a restaurant with the murder victim, and the other four relating to the time of the victim's death. The instruction was properly rejected because, even viewed in isolation, the listed items would not amount to probable cause. Even more importantly, the real issues of fact regarding probable cause which were raised at the trial were in no way addressed by the proposed instruction because it did not allow for the jury's consideration of the reasonableness of the petitioners' conclusions as to matters such as time of death or the respondent's involvement in the crime in light of the many other facts known to them.

III

THE STANDARDS FOR DETERMINING THE PROPRIETY OF A REMAND FOR PARTIAL RETRIAL ARE WELL-SETTLED, AND NO SIGNIFICANT QUESTION REGARDING THEIR APPLICATION IS RAISED BY THIS CASE

In Gasoline Products Company v. Champlin Refinery Co., 283 U.S. 494, 51 S.Ct. 513, 75 L. Ed. 1188 (1931), this Court held that where an appellate court finds error to have affected a single issue at trial, the court has the discretion to remand the cause for a new trial limited in scope to that one issue. See also Fed. R. Civ. P. 59(a). Subsequent to the decision in Gasoline Products, the federal appellate courts have exercised this discretion in a consistent and evenhanded manner by applying, on a case by case basis, the principles enunciated in that case. As developed by the courts, the well-established test for the propriety of a limited remand involves an analysis of the following factors: (1) is the issue to be retried

separable and distinct from the other issues in the case; (2) did the error below affect the determination of any other issues; and (3) would a partial new trial cause injustice or create confusion and uncertainty. See 6A Moore's Federal Practice §59.06 (2d ed. 1976); 11 Wright & Miller, Federal Parctice and Procedure §2814 (1973); and the numerous cases cited therein.

Contrary to the petitioners' assertions, these principles and their application have not received disparate treatment by the various federal circuits. Each of the cases cited by the petitioners, while reaching different results based on the particular facts and circumstances involved, applies the same basic standards and analysis. See, e.g., Lies v. Farrel Lines, Inc. 641 F.2d 765, 775-776 (9th Cir. 1981); Bosse v. Litton Unit Handling Systems, 646 F.2d 689, 694 (1st Cir. 1981); Vizzini v. Ford Motor Co., 569 F.2d 754, 760-761 (5th Cir. 1977); Williams v. Slade, 431 F.2d 605, 608-609 (5th Cir. 1970). The suggestion that the Fifth Circuit has,

in effect, adopted a test which precludes a partial remand on the issue of damages whenever questions of causation are involved in the reversal is not supported by case law. See Nat Harrison Associates, Inc. v. Gulf States Utilities Co., 491 F.2d 578, 588 (5th Cir. 1974) in which the court ordered a limited retrial where the reversal was based in part on defects regarding proof of causation in the calculation of damages. Cf. Fury Imports v. Shakespeare Co., 554 F.2d 1376, 1387-1388 (5th Cir. 1977).

Moreover, even assuming that such a test had been adopted in some circuits but not in others, the instant case would not present a substantial issue regarding the application of that standard. In finding petitioners liable for damages to the respondent, the jury below necessarily made the factual determinations that (1) the petitioners caused Smiddy to be deprived of his constitutional right to be free from arrest and detention not based upon probable cause, and (2) Smiddy suffered damages as a result of that deprivation.

The Ninth Circuit affirmed the jury's factual determination of petitioners' liability, including the finding of causation. The judgment against the petitioners was reversed only to the extent that it presumably included damages suffered after the filing of the criminal complaint. The court's limited remand for determination of the amount of damages attributable to the period prior to the filing of the charge in no way implicates or disturbs the jury's findings on the basic questions of causation which were implicit in the verdict of liability. 9/

9/ Of course, the task of apportioning the respondent's damages may involve some determination of questions in the nature of causation, and the opinion of the Court of Appeals describes the remand as requiring a consideration of "proximate causation." (Appendix A to Petition for Certiorari, p. A-13). Compare the characterization of this issue by Prosser:

> Once it is determined that the defendant's conduct has been a cause of some damage suffered by the plaintiff, a further question may arise as to the portion of the total damage sustained which may properly be assigned to the defendant, as distinguished from other causes. The question is primarily not one of the fact of causation, but (cont.)

Under these circumstances, it is clear that the remand for a partial retrial in this case was appropriate under any reasonable interpretation or application of Gasoline Products Company, supra. It is therefore respectfully submitted that the petitioners' request for review of this issue should be denied.

9/ (cont.)

> of the feasibility and practical convenience of splitting up the total harm into separate parts which may be attributed to each of two or more causes.

Prosser, Law of Torts (4th Ed. 1971) p. 313. Regardless of how the question of apportionment is framed, however, it is certainly "clearly separable" from the issue of liability. Gasoline Products Company v. Champlin Refining Co., 283 U.S. 494, 499, 51 S.Ct. 513, 514, 75 L.Ed. 1188 (1931).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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Respectfully submitted,

ROBERT M. TALCOTT
TALCOTT, VANDEVELDE
& WOEHRLE

Counsel of Record for
Respondent

JOHN H. BISBEE
BISBEE & NAGAN

Counsel for Respondent